Supreme Court, U.S.
FILED
DEC 15 2006
OFFICE OF THE CLERK

No. 06-849

In The

Supreme Court of the United States

STEVEN IRA COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ERWIN CHEMERINSKY
Counsel of Record
DUKE UNIVERSITY
SCHOOL OF LAW
Science Drive &
Towerview Rd.
Durham, North Carolina
27708
(919) 613-7173

LARRY C. ECONOMOS
MILLS & ECONOMOS, LLP
200 West Third Street
Greenville, South Carolina
27835
(252) 752-6161

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a criminal defendant maintains a right to appeal a restitution order when the plea agreement includes a waiver as to appellate review of the sentence, but does not make reference to appeal of the restitution order.

2. Whether a federal district court may order restitution based upon the dismissed counts of an indictment when there is a guilty plea for conspiracy or whether restitution must be limited to the specific counts of fraud to which the defendant pled guilty.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	1
Statement of the Case	2
Statement of Facts	3
Reasons for Granting the Writ	7
I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND AN ISSUE OF NATIONAL IMPORTANCE CONCERNING WHETHER A CRIMINAL DEFENDANT MAINTAINS A RIGHT TO APPEAL A RESTITUTION ORDER WHEN THE PLEA AGREEMENT INCLUDES A WAIVER AS TO REVIEW OF THE SENTENCE BUT DOES NOT MAKE REFERENCE TO APPEAL OF RESTITUTION	8
II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT AMONG THE CIRCUITS AND AN ISSUE OF NATIONAL IMPORTANCE CONCERNING WHETHER A FEDERAL DISTRICT COURT IN CALCULATING RESTITUTION MAY ORDER RESTITUTION BASED UPON DISMISSED COUNTS OF AN INDICTMENT WHEN THERE IS A GUILTY PLEA FOR CONSPIRACY	12
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES

Hughey v. United States, 495 U.S. 411 (1990) 13, 14

United States v. Adams, 363 F.3d 363 (5th Cir. 2004) 16, 17, 18

United States v. Akande, 200 F.3d 136 (3d Cir. 1999) 16

United States v. Behrman, 235 F.3d 1049 (7th Cir. 2000) 11

United States v. Bright, 353 F.3d 1114 (9th Cir. 2004) 16

United States v. Cronin, 990 F.2d 663 (1st Cir. 1993) 14

United States v. Cupit, 169 F.3d 536 (8th Cir. 1999) 10

United States v. Jewett, 978 F.2d 248 (6th Cir. 1992) 14

United States v. Oladimeji, 463 F.3d 152 (2d Cir. 2006) 9, 13

United States v. Manzer, 69 F.3d 222 (8th Cir. 1995) 14

United States v. Newsome, 322 F.3d 328 (4th Cir. 2003) 15

United States v. Phillips, 174 F.3d 1074 (9th Cir. 1999) 11

United States v. Rand, 403 F.3d 489 (7th Cir. 2005) 15

United States v. Ready, 82 F.3d 551 (2d Cir. 1996) 9, 10

United States v. Seligsohn, 981 F.2d 1418 (3d Cir. 1992) 14

United States v. Sharp, 442 F.3d 946 (6th Cir. 2006) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Sharp, 941 F.2d 811 (9th Cir. 1991)..... 15

United States v. Sistrunk, 432 F.3d 917 (8th Cir. 2006)..... 10

United States v. Souffer, 986 F.2d 916 (5th Cir.), *cert. denied*, 510 U.S. 837 (1993)..... 14

United States v. Stone, 948 F.2d 700 (11th Cir. 1991)..... 15

United States v. Turing, 978 F.2d 315 (7th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993)..... 14

STATUTES

18 U.S.C. § 1341..... 2

18 U.S.C. § 1347..... 2

18 U.S.C. § 1512(b)(1)..... 4

18 U.S.C. § 3662(a)(3)..... 12

18 U.S.C. § 3663..... 4

18 U.S.C. § 3663A.....1, 2, 4, 5, 14

18 U.S.C. § 3742.....5, 7, 10

28 U.S.C. § 2255..... 5

MISCELLANEOUS

United States Sentencing Commission, 2005 Sourcebook of Federal Sentencing Statistics (tbl. 15) http://www.ussc.gov/ANNRPT/2005/table15_pre.pdf, http://www.ussc.gov/ANNRPT/2005/table15_post.pdf (last checked November 30, 2006)..... 8

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, issued on August 17, 2006, and published at 459 F.3d 490 (4th Cir. 2006), is attached as Appendix (hereafter "App.") at 1. The unpublished order of the United States Court of Appeals for the Fourth Circuit, issued on September 18, 2006, denying the petition for rehearing is attached at App. 37.

The unpublished judgment and orders of the United States District Court for the Eastern District of North Carolina are attached at App. 20-36.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, provides, in part:

> "(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (C), the court shall order . . . that the defendant make restitution to the victim of the offense . . .
>
> > (2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution

> may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.
>
> (3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense. . . .
>
> (C)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense
>
> (A) that is –
>
> (i) a crime of violence, as defined in section 16;
>
> (ii) an offense against property under this title . . . including any offense committed by fraud or deceit . . . "

STATEMENT OF THE CASE

Pursuant to a written plea agreement, Steven Ira Cohen pled guilty in the United States District Court for the Eastern District of North Carolina to two counts of mail fraud, 18 U.S.C. § 1341, and one count of conspiracy to commit health care fraud, 18 U.S.C. § 1347. The district court sentenced Cohen to a term of 28 months imprisonment, followed by a three-year term of supervised release, and ordered Cohen to pay $371,901 in restitution, pursuant to the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A.

Cohen appealed to the United States Court of Appeals for the Fourth Circuit, arguing that the district court erred in determining the amount of loss for sentencing purposes and in calculating the amount of restitution owed to his victims. The United States moved to dismiss the appeal based on an appeal waiver contained in Cohen's plea agreement. The United States Court of Appeals for the Fourth Circuit held that the appeal waiver was valid and precluded appeal of both the sentence of imprisonment and the restitution order. Cohen's appeal was thus dismissed. App. at 19.

Cohen now seeks review in this Court of the restitution order and specifically whether an appeal waiver that does not mention restitution bars appeal of the restitution order and whether restitution must be based solely on the specific conduct to which the defendant pled guilty.

STATEMENT OF FACTS

Steven Ira Cohen is a chiropractor licensed to practice in the State of North Carolina, who has owned, operated, and practiced at several chiropractic clinics in the State since the early 1980s. In January 2004, Cohen was indicted on 21 counts of mail fraud and 16 counts of health care fraud. The first indictment charged that, from July 6, 1998 through October 22, 1998, Cohen devised a scheme to defraud Blue Cross/Blue Shield and the United States Department of Labor's Office of Worker's Compensation Programs by submitting claims for medical services that had never been provided and by submitting claims that misrepresented the nature and extent of patient treatments.

Approximately three months later, Cohen was charged in a separate indictment with one count of conspiracy to commit health care fraud, 511 counts of health care fraud, one count of conspiring to launder money, in violation of 18 U.S.C. § 1956, and two counts of attempting to influence a witness, in violation of 18 U.S.C. § 1512(b)(1). The second indictment alleged that from June 1999 through April 2004, Cohen set up several different clinics and conspired with others to submit false and fraudulent health care claims to Blue Cross/Blue Shield and several additional insurance companies.

On July 7, 2004, the district court ordered the two indictments consolidated for trial. On July 23, 2004, the parties reached a plea agreement that was memorialized in writing. The government drafted the plea agreement.

In paragraphs 2.a. and 2.b. of the plea agreement, respectively, Cohen agreed, without qualification, "[t]o plead guilty to counts sixteen and seventeen of the [First Indictment], filed January 14, 2004; and count one of the [Second] Indictment filed April 15, 2004," and "[t]o make restitution to any victim in whatever amount the Court may order, pursuant to 18 U.S.C. §§ 3663 and 3663A [of the MVRA]." Counts sixteen and seventeen of the first indictment charged Cohen with receiving payment from Blue Cross/Blue Shield for two fraudulent health care claims. Count one of the second indictment charged Cohen with a conspiracy to defraud the insurance companies between June 1999 and April 2004.

Although count one of the second indictment charged Cohen with broad schemes of conspiracy during this time, the factual basis underlying Cohen's plea was restricted to submitting false claims for an isolated and specific medical

procedure, "needle electromyographies," between "2000 and 2002." These three counts, as restricted by the factual basis for the conspiracy count, amounted to $7,331.00 in fraudulent claims.

Paragraph 2.c. of the agreement included an appeal waiver, under which Cohen agreed:

> To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal whatever sentence is imposed, including any issues that relate to the establishment of the [applicable and advisory] Guideline range, reserving only the right to appeal from an upward departure from the Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the Government of any of its rights to appeal provided by law.

In paragraph 4 of the agreement, Cohen represented that he understood the maximum terms of imprisonment for his crimes, as well as the applicable penalty of "[r]estitution pursuant to 18 U.S.C. §§ 3663 and 3663A [of the MVRA], and as agreed to in paragraph 2(b) [of the agreement]."

Following a guilty plea proceeding pursuant to Rule 11(b) of the Federal Rules of Criminal Procedure, the district court accepted Cohen's plea. At the subsequent sentencing hearing, the district court heard arguments and evidence as to the amount of loss for purposes of

calculating the advisory guideline sentence, as well as to the amount of restitution due under the MVRA. The dollar loss of the alleged fraud introduced at the hearing totaled $31,131.50 and the evidence of fraudulent needle electromyographies totaled $9,205.

Nonetheless, at the conclusion of the hearing, the district court calculated the amount of loss from the fraudulent schemes, for purposes of determining Cohen's advisory guideline range, at $377,095. Cohen was sentenced to 28 months in prison, followed by a three-year term of supervised release. App. 23. In addition, the district court calculated Cohen's restitution obligations to his victims to be $371,901. App. 26.

The $377,095 loss calculation was based upon the loss allocated to four insurance carriers (Allstate Insurance ($17,150), Nationwide Insurance ($20,135), State Farm Insurance ($49,440), and Blue Cross/Blue Shield ($290,370)). The restitution amounts for each company were identical to this, with the exception of Allstate Insurance Company, which had a loss amount of $17,150, but a restitution amount of $11,976. App. 28.

Cohen appealed to the United States Court of Appeals for the Fourth Circuit, including on the ground that the restitution order violated the Mandatory Victims Restitution Act of 1996 ("MVRA"). Specifically, Cohen argued that the district court exceeded its authority under the MVRA by ordering him to pay restitution amounts that were determined without any factual evidence linking the alleged acts of fraud to the record of insurance claim payments introduced at the evidentiary hearing. Cohen pled guilty to offenses that had a total dollar cost of $7,331.50 ($7,165 for the conspiracy count in the second

indictment and $166.50 for the face amount of the claims involved in the two counts of mail fraud in the first indictment). App. 16-17. Therefore, Cohen argued that the restitution order exceeded the statutory authority under the MVRA and was impermissible as a matter of law because it was not limited to the counts to which he pled guilty.

The United States Court of Appeals for the Fourth Circuit found that the appeal waiver included in the plea agreement barred appeal of the restitution order, even though restitution was not mentioned in the waiver provision. Although recognizing a conflict among the Circuits on this issue, the Fourth Circuit stated: "In sum, we conclude that, as a general rule, a defendant who has agreed '[t]o waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal whatever sentence is imposed,' has waived his right to appeal a restitution order." App. 12. The court also concluded that the amount of the restitution order was permissible even though it was based on counts of the indictment that had been dismissed as part of the plea agreement. App. 18.

REASONS FOR GRANTING THE WRIT

Restitution, pursuant to the MVRA, is ordered in a significant number of federal criminal cases each year, especially those involving fraud claims. In 2005, 8,846 offenders were ordered by federal courts to pay restitution. This is 12.4% of the 71,476 criminal offenders sentenced in federal court that year. Of those convicted of fraud, 56.8% (3,668 of 6,458) were ordered to pay restitution in 2005. United States Sentencing Commission, 2005 Sourcebook of

Federal Sentencing Statistics (tbl. 15) http://www.ussc.gov/ANNRPT/2005/table15_pre.pdf, http://www.ussc.gov/ANNRPT/2005/table15_post.pdf (last checked November 30, 2006).

Thus, issues concerning restitution orders frequently arise and this case presents an excellent vehicle for resolving two questions which have split the Circuits.

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND AN ISSUE OF NATIONAL IMPORTANCE CONCERNING WHETHER A CRIMINAL DEFENDANT MAINTAINS A RIGHT TO APPEAL A RESTITUTION ORDER WHEN THE PLEA AGREEMENT INCLUDES A WAIVER AS TO REVIEW OF THE SENTENCE BUT DOES NOT MAKE REFERENCE TO APPEAL OF RESTITUTION.

To this point, six Circuits, including the Fourth Circuit in this case, have addressed the question of whether a criminal defendant who has pled guilty and waived his right to appeal the sentence nonetheless may appeal the restitution order when the appeal waiver is silent about restitution. The Second, Eighth, and Ninth Circuits have found that there is not a waiver and a defendant in Cohen's situation may appeal the restitution order. By contrast, the Fourth, Sixth, and Seventh Circuits have found that there is a waiver that precludes appeal. This Court should grant review to resolve this split in authority on a question that frequently arises in federal courts across the country.

Contrary to the conclusion of the Fourth Circuit in this case, several Circuits have held that a waiver in a

guilty plea of the right to appeal the sentence does not preclude appeal of a restitution order. Most recently, the Second Circuit In *United States v. Oladimeji*, 463 F.3d 152 (2d Cir. 2006), came to this conclusion. A defendant pled guilty to fraud and as a term of the plea agreed that he would "not file an appeal or otherwise challenge the conviction or sentence in . . . the event that the Court imposes a total term of imprisonment of 114 months . . . or below." Id. at 156. The court said that the question it faced "is whether this commitment bars Oladimeji's appeal from the portion of his sentence commanding payment of restitution." Id.

The Second Circuit answered this question by declaring: "We have previously stated that we apply appeal-waiver provisions 'narrowly' and construe them 'strictly against the Government,' in recognition of the fact that prosecutors' bargaining power generally exceeds that of defendants and that the government typically drafts such agreements." Id. at 157. The court explained:

> "Here, although a broad and literal reading of the agreement would bar appeal from any aspect of the sentence, the agreement could also be reasonably construed to bar challenges to the conviction and to the duration of confinement, but not to cover determinations of restitution. . . . We find that the agreement's use of the term 'sentence' was at least ambiguous, and we resolve that ambiguity against the government. Having found that Oladimeji's appeal of his restitution order is not covered by the applicable appeal-waiver provision, we proceed to the merits of his arguments." Id.

Prior Second Circuit decisions had come to a similar conclusion. In *United States v. Ready*, 82 F.3d 551 (2d Cir.

1996), a defendant agreed to an appeal waiver that was very similar to the waiver in this case.[1] The court concluded that the waiver did not preclude the ability to appeal the restitution order. The court declared: "It is thus ambiguous whether paragraph 5's reference to 'whatever sentence is imposed' includes the restitution penalty imposed. Once again, this ambiguity must be construed strictly against the Government." Id. at 560.

The Eighth Circuit has come to the identical conclusion that appeal waivers in guilty pleas do not preclude appeals of restitution orders. *See United States v. Sistrunk*, 432 F.3d 917, 918 (8th Cir. 2006); *United States v. Cupit*, 169 F.3d 536, 539 (8th Cir. 1999). The Eighth Circuit concluded that language in a plea agreement which provided that the parties "waive all rights to appeal whatever sentence is imposed" does not include a waiver of the ability to appeal the restitution order. The court said that there was not sufficiently clear language to indicate that there was a waiver of the ability to challenge the restitution order. The waiver in this case involves exactly the same language as in *Sistrunk* and *Cupit*; Cohen agreed "to waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742 to appeal whatever sentence is imposed."

The Ninth Circuit, too, has come to this conclusion that a waiver of the right to appeal a sentence as part of a

---

[1] The waiver in *Ready* was almost identical to that in this case and provided: "The [defendant] and the United States knowingly and expressly waive all rights conferred by 18 U.S.C. § 3742 to appeal whatever sentence is imposed, including any issues that relate to the establishment of the guideline range, reserving only the right to appeal from a sentence resulting from an adjusted base offense level of greater than twenty-three." 82 F.3d at 554.

plea agreement does not preclude a challenge to the restitution order. In *United States v. Phillips*, 174 F.3d 1074 (9th Cir. 1999), the Court of Appeals vacated the restitution order imposed on a criminal defendant. The court concluded that the appeal waiver was ambiguous as to whether it included a bar on appealing the restitution order. The court observed that "[p]lea agreements are governed by contract principles. Thus, in interpreting plea agreements, the government is to be held to the literal terms of the agreement ... and ordinarily must bear responsibility for any lack of clarity." Id. at 1075-76 (citations omitted).

However, several Circuits have come to an opposite conclusion, including the Fourth Circuit in this case. Although the Fourth Circuit acknowledged these contrary decisions of the Second, Eighth, and Ninth Circuits, it invoked authority from the Sixth and Seventh Circuits as supporting its conclusion. App. 12-13.

In *United States v. Sharp*, 442 F.3d 946 (6th Cir. 2006), the court found that a waiver of the right to appeal a sentence precluded an appeal of a restitution order. The court stated: "If Sharp had wished to reserve his right to appeal the restitution order, he should have negotiated for that right in his plea agreement. Because he did not do so, we cannot reach the merits of his restitution claim." Id. at 952.

The Fourth Circuit in this case also invoked *United States v. Behrman*, 235 F.3d 1049, 1052 (7th Cir. 2000), which stated that "[a]n agreement waiving appeal from 'any sentence within the maximum provided by Title 18' or similar language would foreclose an appeal from the restitution order."

Thus, there is a clear split among the Circuits as to whether a general waiver of the right to appeal a criminal sentence as part of a plea agreement precludes an appeal of a restitution order. The Second, Eighth, and Ninth Circuits conclude that plea agreements should be construed against the government and should not be seen as including a waiver of the ability to appeal a restitution order unless that is specifically a part of the agreement. By contrast, the Fourth, Sixth, and Seventh Circuits conclude that a waiver to appeal a sentence includes a preclusion of the ability to challenge a restitution order and a defendant who wants to preserve the right to such an appeal must do so explicitly.

This case presents an ideal vehicle for resolving this conflict. The plea agreement here is typical of that used across the country and has identical language to that found in waiver clauses in these other cases. This is an issue that arises constantly and requires clarification from this Court.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT AMONG THE CIRCUITS AND AN ISSUE OF NATIONAL IMPORTANCE CONCERNING WHETHER A FEDERAL DISTRICT COURT IN CALCULATING RESTITUTION MAY ORDER RESTITUTION BASED UPON DISMISSED COUNTS OF AN INDICTMENT WHEN THERE IS A GUILTY PLEA FOR CONSPIRACY.

Federal law provides that "[t]he court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3662(a)(3). But the unresolved question is whether this limits restitution to

the specific offenses to which the defendant pled guilty or whether a guilty plea to a conspiracy means that restitution may be based on all of the offenses contained in the indictments including the dismissed counts. Here, the restitution order for $371,901 far exceeded the $7,331.50 monetary loss of the offenses to which Cohen pled guilty. App. 16-17.

This Court, in interpreting the prior federal restitution statute, ruled that restitution must be limited to the offenses to which the defendant pled guilty. In *Hughey v. United States*, 495 U.S. 411 (1990), this Court held that federal law authorizes an award of restitution only for the loss caused by the specific conduct that was the basis of the conviction. The defendant in *Hughey* pled guilty on one count of an indictment alleging his theft and unauthorized use of credit cards. The Court considered the legality of a restitution order that encompassed damages caused by the defendant's fraudulent use of many credit cards. Id. at 414-15. This Court ruled that this was impermissible. The Court concluded that the courts lacked authority, under the relevant statute, to order a defendant, who was charged with multiple offenses, but pled guilty to only one, to make restitution for losses arising from related offenses to which he had not pleaded guilty.

The Courts of Appeals, since the adoption of the Mandatory Victims Restitution Act in 1996, have expressly held that the *Hughey* analysis applies under the current statute. *See, e.g., United States v. Oladimeji*, 463 F.3d 152, 158 n.1 (2d Cir. 2006) ("The analysis in *Hughey* was based on former 18 U.S.C. §§ 3579 and 3580, but the Court's analysis applied with full force to the case before us. . . . That Oladimeji's restitution order was apparently based

on the mandatory restitution provisions of 18 U.S.C. § 3663A also does not alter our analysis.")

The issue, then, is whether under the MVRA and the *Hughey* analysis a defendant who pleads guilty to conspiracy can be ordered to pay restitution for all of the counts in the indictments or only for those overt acts for which there was a guilty plea. This is an issue that long has split the Circuits and never has been resolved by this Court. The Tenth Circuit acknowledged and described the split in authority on this issue:

> The circuits have split on application of *Hughey* in mail fraud cases because, as in this case, the specific offenses of conviction involving particular mailings incorporate by reference the overall scheme to defraud. Some circuits hold that because a mail (or wire) fraud conviction requires proof of the overall fraudulent scheme, the "specific conduct" under Hughey includes losses resulting from the overall scheme. *See United States v. Manzer*, 69 F.3d 222, 229-30 (8th Cir. 1995); *United States v. Souffer*, 986 F.2d 916, 928-29 (5th Cir.), *cert. denied*, 510 U.S. 837 (1993); *United States v. Turing*, 978 F.2d 315, 317-19 (7th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Other circuits hold that the "specific conduct" is only the particular use of the mails described in the offense of conviction and that "acts other than the particular mailing described in a count of conviction, even when committed during the course of or in furtherance of the same fraudulent scheme, do not state independent 'offenses of conviction.'" *United States v. Jewett*, 978 F.2d 248, 251-52 (6th Cir. 1992); *accord United States v. Cronin*, 990 F.2d 663, 666 (1st Cir. 1993); *United States v. Seligsohn*, 981 F.2d

1418, 1421 (3d Cir. 1992); *United States v. Stone*, 948 F.2d 700, 703-04 (11th Cir. 1991); *United States v. Sharp*, 941 F.2d 811, 814-15 (9th Cir. 1991).

This split in authority has continued under the MVRA. Some Circuits, including the Fourth Circuit in this case, have held that restitution orders can be based on all of the offenses charged when there is a guilty plea to conspiracy and need not be limited to the counts of the indictment for which there is a guilty plea or proof at trial. In *United States v. Newsome*, 322 F.3d 328 (4th Cir. 2003), the court rejected the defendant's claim that restitution should be limited to the harm caused by the substantive offense of which he was convicted despite his conviction for a broader conspiracy. The court declared that "under the MVRA, each member of a conspiracy that in turn causes property loss to a victim is responsible for the loss caused by the offense." Id. at 341.

Likewise, in this case, the Fourth Circuit expressly rejected Cohen's argument "that the offense of conviction for purposes of the MVRA was restricted by Cohen's specific 'admissions of guilt as specifically defined by the factual basis for his plea' contained in the plea agreement." App. 16. The Fourth Circuit concluded: "In sum, we are satisfied that the district court complied with its mandatory statutory obligation to order restitution to all 'victims' of the conspiracy to which Cohen pled, even if Cohen did not expressly admit to each and every overt act to support it." App. 18.

The Fourth Circuit is not alone in taking this approach. For example, the Seventh Circuit came to an identical conclusion in *United States v. Rand*, 403 F.3d 489 (7th Cir. 2005), and held that a defendant who pleads

guilty to a conspiracy can be ordered to pay restitution for all counts of an indictment, even ones for which there was no guilty plea. The Ninth Circuit has gone so far as to hold that dismissed counts of an indictment can be used in calculating the amount of the restitution order. *See United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004).

On the other hand, other Circuits have held that such expansive restitution orders are not allowed under the MVRA. For example, the Third Circuit noted that the expansion of authority for restitution orders in the MVRA "is not so broad that it permits a district court to order restitution to anyone harmed by any activity of the defendant related to the scheme, conspiracy, or pattern." *United States v. Akande*, 200 F.3d 136, 139 (3d Cir. 1999) (citation omitted). The Third Circuit said that "Congress intended that restitution was to be readily determined by the sentencing judge based upon the evidence produced during trial or in the course of plea proceedings." Id. That approach is markedly different from that used by the Fourth Circuit in this case where Cohen pled guilty to crimes involving losses of $7,331.50, but the restitution order was for $371,901.

The Fifth Circuit in *United States v. Adams*, 363 F.3d 363 (5th Cir. 2004), addressed exactly the issue presented in this case and came to the opposite conclusion of the Fourth Circuit. In *Adams* the defendant was charged in a fifteen-count indictment with conspiracy to commit mail fraud, wire fraud, and interstate carrier fraud. Count 1 described the broad based conspiracy, outlining the defendant's broad scheme to stage fourteen car accidents and file false insurance claims between 1999 and 2002. Counts 2 through 15 listed separate overt acts performed in furtherance of the conspiracy; and each substantive count

specifically incorporated the broad conspiracy outlined in Count 1 as the requisite scheme to defraud. The defendant was specifically named in eleven of the substantive counts. The defendant, by way of plea agreement, pled to two substantive counts with a stipulated factual basis narrower than the counts.

The government in *Adams* argued that, under the authority provided by the MVRA, the court had the authority to award restitution to all victims of the conspiracy as alleged in the broad-based indictment, as the defendant had pled guilty to a conspiracy. The court disagreed with the government, holding that when a defendant is convicted of fraud pursuant to a plea agreement the court looks beyond the indictment, and defines the underlying scheme by referring to the mutual understanding of the parties. Id. at 366. To determine the mutual understanding of the parties, the court reviewed the indictment, the factual basis for the plea, the plea agreement, and statements made at the sentencing hearing. Id. at 367. The court then concluded: "[T]he context of Adams's guilty plea makes clear that the parties mutually understood that the conviction was based on a scheme to defraud that was narrower than the scheme outlined in Count 1. The Government's proposed factual basis neither incorporates Count 1 of the indictment nor references any one of the twelve accidents allegedly staged by the defendants." Id. The court also noted that the language of the plea agreement, and the statements of the parties' during the course of the sentencing hearing, did not suggest that Adams agreed to pay restitution for harm caused by a fraudulent scheme exceeding the scope of the factual basis supporting his guilty plea. Id.

Under the Fifth Circuit's approach in *Adams* the restitution in this case would be limited to $7,331.50, not the $371,901 that was imposed and upheld by the Fourth Circuit. Thus, the approach of the Third and Fifth Circuits is quite different in how restitution may be calculated compared to that used in the Fourth, Seventh, and Ninth Circuits.

As explained above, restitution is ordered in a significant number of cases each year in federal court, including a majority of cases in which there is a conviction for fraud. The appropriate method of calculating restitution when there has been a guilty plea thus continually arises and requires clarification from this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
DUKE UNIVERSITY
SCHOOL OF LAW
Science Drive &
Towerview Rd.
Durham, North Carolina
27708
(919) 613-7173

LARRY C. ECONOMOS
MILLS & ECONOMOS, LLP
200 West Third Street
Greenville, South Carolina
27835
(252) 752-6161

Attorneys for Petitioner

459 F.3d 490

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Steven Ira **COHEN**, Defendant-Appellant.
No. 05-4565.

Argued May 26, **2006**.
Decided Aug. 17, **2006**.

ARGUED: Larry Constantine Economos, Mills & Economos, L.L.P., Greenville, North Carolina, for Appellant. Anne Margaret Hayes, Assistant United States Attorney, Office of The United States Attorney, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Frank D. Whitney, United States Attorney, Christine Witcover Dean, Assistant United States Attorney, Office of the United States Attorney, Raleigh, North Carolina, for Appellee.

Before NIEMEYER and TRAXLER, Circuit Judges, and JOSEPH R. GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Dismissed by published opinion. Judge TRAXLER wrote the opinion, in which Judge NIEMEYER and Judge GOODWIN joined.

OPINION

TRAXLER, Circuit Judge.

Pursuant to a written plea agreement, Steven Ira Cohen pled guilty to two counts of mail fraud, *see* 18 U.S.C.A. § 1341 (West Supp.**2006**), and one count of conspiracy to commit health care fraud, *see* 18 U.S.C.A. § 1347 (West 2000). The district court sentenced Cohen to

a term of 28 months imprisonment, followed by a three-year term of supervised release, and ordered Cohen to pay $371,901 in **restitution**, pursuant to the Mandatory Victims **Restitution** Act ("MVRA"), *see* 18 U.S.C.A. § 3663A (West 2000 & Supp.**2006**).

Cohen now seeks to appeal, arguing that the district court erred in determining the amount of loss for sentencing purposes and in calculating the amount of **restitution** owed to his victims. The United States moved to dismiss the appeal based on an appeal waiver contained in Cohen's plea agreement. Because the appeal waiver is valid and the issues Cohen seeks to raise fall within its scope, we grant the government's motion and dismiss the appeal.

I.

Defendant Cohen is a chiropractor licensed to practice in the State of North Carolina, who has owned, operated, and practiced at several chiropractic clinics in the state since the early 1980s. In January 2004, Cohen was indicted on 21 counts of mail fraud and 16 counts of health care fraud (the "First Indictment"). The First Indictment charged that, from July 6, 1998 through October 22, 1998, Cohen devised a scheme to defraud Blue Cross/Blue Shield ("BCBS") and the United States Department of Labor's Office of Worker's Compensation Programs ("OWCP") by submitting claims for medical services that had never been provided and by submitting claims that misrepresented the nature and extent of patient treatments. According to the First Indictment, Cohen's fraudulent claims caused BCBS and OWCP to send checks by U.S. Mail in payment for the services purportedly rendered at Cohen's clinics.

Approximately three months later, Cohen was charged in a separate indictment with one count of conspiracy to commit health care fraud, 511 counts of health care fraud, one count of conspiring to launder money, in violation of 18 U.S.C.A. § 1956 (West 2000 & Supp.**2006**), and two counts of attempting to influence a witness, in violation of 18 U.S.C.A. § 1512(b)(1) (West 2000) (the "Second Indictment"). The Second Indictment charged a much broader scheme, alleging that from June 1999 through April 2004, Cohen set up several different clinics and conspired with others, including other medical providers, to submit false and fraudulent health care claims to BCBS and several additional insurance companies. According to the Second Indictment, Cohen and other members of the conspiracy submitted claims with fictitious addresses, multiple claims for the same treatment, claims for services that were never rendered, and claims that misrepresented the nature of the treatment provided. Each of the 511 separate counts of health care fraud represents a separate fraudulent billing that incorporates by reference the factual basis of the conspiracy.

On July 7, 2004, the district court ordered the two indictments consolidated for trial. The parties engaged in plea negotiations and, on July 23, 2004, reached a plea agreement that was memorialized in writing. In paragraphs 2.a. and 2.b. of the plea agreement, respectively, Cohen agreed, without qualification, "[t]o plead guilty to counts sixteen and seventeen of the [First Indictment], filed January 14, 2004; and count one of the [Second] Indictment filed April 15, 2004," and "[t]o make **restitution** to any victim in whatever amount the Court may order, pursuant to 18 U.S.C. §§ 3663 and 3663A [of the MVRA]." J.A. 65. Counts sixteen and seventeen of the

First Indictment charged Cohen with receiving payment from BCBS for two fraudulent health care claims. Count One of the Second Indictment charged Cohen with the June 1999 through April 2004 conspiracy to defraud the insurance companies.

Paragraph 2.c. of the agreement memorialized an appeal waiver, under which Cohen agreed:

> To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal whatever sentence is imposed, including any issues that relate to the establishment of the [applicable and advisory] Guideline range, reserving only the right to appeal from an upward departure from the Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the Government of any of its rights to appeal provided by law.

J.A. 66. In paragraph 4 of the agreement, Cohen represented that he understood the maximum terms of imprisonment for his crimes, as well as the applicable penalty of "**[r]estitution** pursuant to 18 U.S.C. §§ 3663 and 3663A [of the MVRA], and as agreed to in paragraph 2(b) [of the agreement]." J.A. 71, 72.

Following a guilty plea proceeding pursuant to Rule 11(b) of the Federal Rules of Criminal Procedure, the district court accepted Cohen's plea. At the subsequent

sentencing hearing, the district court heard arguments and evidence as to the amount of loss for purposes of calculating the advisory guideline sentence, as well as to the amount of **restitution** due under the MVRA. At the conclusion of the hearing, the district court calculated the amount of loss from the fraudulent schemes, for purposes of determining Cohen's advisory guideline range, at $377,095. Cohen was sentenced to 28 months in prison, followed by a three-year term of supervised release. In addition, the district court calculated Cohen's **restitution** obligations to his victims to be $371,901.[1]

II.

Despite the appeal waiver, Cohen thereafter filed this appeal seeking to challenge the district court's calculation of the $377,095 guideline loss as clearly erroneous, and the **restitution** amount of $371,901 as an abuse of discretion. He argues that the appeal waiver provision contained in the plea agreement is invalid and unenforceable. Even if enforceable, Cohen argues that he may nevertheless appeal the **restitution** portion of the order because **restitution** falls outside the scope of the appeal waiver.

The government moved to dismiss the appeal based upon the appeal waiver. Thus, "[t]he threshold issue we must consider is whether the appeal waiver in [Cohen's]

---

[1] The $377,095 loss calculation was based upon loss allocated to four insurance carriers (Allstate Insurance ($17,150), Nationwide Insurance ($20,135), State Farm Insurance ($49,440), and Blue Cross Blue Shield ($290,370)). The **restitution** amounts for each company were identical, with the exception of Allstate Insurance Company, which had a loss amount of $17,150, but a **restitution** amount of only $11,976.

plea agreement precludes him from presenting these issues on appeal." *United States v. Blick,* 408 F.3d 162, 167 (4th Cir. 2005). Generally speaking, we will uphold a defendant's waiver of appellate rights if the waiver is valid and the issue sought to be appealed falls within the scope of the waiver. *See United States v. Attar,* 38 F.3d 727, 731-33 (4th Cir. 1994); *see also Blick,* 408 F.3d at 168 (We "adhere [] to the principle that sentencing appeal waivers generally are enforceable, and we have enforced such waivers in a number of cases."). To determine whether an appeal waiver is valid, we look to "whether the defendant knowingly and intelligently agreed to waive the right to appeal," an inquiry "ultimately . . . evaluated by reference to the totality of the circumstances." *Id.* at 169 (internal quotation marks omitted). We review the validity of an appeal waiver *de novo. See id.* at 168.

A.

On appeal, Cohen argues that we should find his appeal waiver to be invalid and unenforceable because: his ability to knowingly and intelligently waive his right to appeal was compromised by his Attention Deficit Hyperactivity Disorder ("ADHD") and accompanying reading and writing disability; the government drafted the plea agreement and he was in an unequal bargaining position given the severity of the charges leveled against him; the appeal waiver was not reciprocal; and the government induced him to sign the plea agreement by promising not to argue a guideline loss in excess of $76,211.61 at sentencing.

Cohen's argument that the agreement was not knowingly and intelligently entered into because he suffered from ADHD during its negotiation and execution is simply

not supported by the record. The record reflects that the district court undertook a careful inquiry to determine that Cohen was competent and understood what he was doing by entering into the plea agreement and pleading guilty. The district court asked specific questions about Cohen's ADHD condition, and explained to Cohen that the court had to be "clear and certain that the record is correct and that you had the requisite understanding of what's going on in order to enter a plea" because "at some point in time, there may be a reason that you or some other individual would challenge your capacity to enter a plea today." S.J.A. 858. Cohen was also represented by counsel during the proceedings, who assured the district court that the various doctors who evaluated Cohen all found him competent to understand the nature of the court proceedings. Cohen's attorney further stated that he had no difficulty communicating with Cohen and had no reason to doubt Cohen's competency. Cohen likewise represented to the district court that he had read his plea agreement, discussed it with his attorney, and understood "the terms, the language, the sentences, even legal phrases" in the agreement after discussing it with his attorney. S.J.A. 864-65.

In sum, the record evidence concerning Cohen's mental impairments shows that he had the ability, after adequate consultation with his lawyer, to enter into a knowing, intelligent and voluntary waiver of his right to appeal, and does not call into question his sworn representations to the district court. *See Blackledge v. Allison,* 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record

are wholly incredible."); *United States v. Lambey,* 974 F.2d 1389, 1395 (4th Cir. 1992) (en banc) ("Statements of fact by a defendant in Rule 11 proceedings may not ordinarily be repudiated, and, similarly, findings by a sentencing court in accepting a plea constitute a formidable barrier to attacking the plea.") (internal quotation marks omitted).

We likewise reject Cohen's argument that his appeal waiver is unenforceable because he was induced to plead guilty based on his "understanding" that the government would not argue at sentencing that his actions resulted in a loss of more than $76,211.61. In essence, Cohen argues that this "understanding" formed a part of his plea agreement, which the government breached by advocating that he was responsible for far higher losses. Although we will not enforce an otherwise valid appeal waiver against a defendant if the government breached the plea agreement containing that waiver, *see Blick,* 408 F.3d at 168, the record in this case does not support Cohen's claim that this "understanding" was part of his plea agreement. Cohen admitted to the district court that the "understanding" was "not committed to writing [in] the plea agreement." J.A. 359. At the plea colloquy, he further represented that the plea agreement contained all agreements he had with the government and that no one had made any other offer to induce him to plead guilty other than what was contained in the plea agreement. We will not invalidate Cohen's appeal waiver based on allegations of an "understanding" that is undocumented and unsupported.

Cohen's claim that we should find the waiver unenforceable based upon his "unequal bargaining position" given the severity of the charges leveled against him is equally unavailing. Cohen was represented by counsel during these proceedings, there is no indication that he

was subjected to any unconscionable conduct during the negotiation process, and Cohen affirmatively represented to the district court that no one had threatened him or tried to force him to plead guilty. S.J.A. 865.[2] Thus, on our review of the record, we conclude that Cohen knowingly and voluntarily entered into the appeal waiver contained in his plea agreement and that it is valid and enforceable.

B.

Having concluded that Cohen is bound by the terms of his appeal waiver, we turn to the question of whether the issues Cohen seeks to raise on appeal "fall within the scope of the appeal waiver." *See Blick,* 408 F.3d at 169. We conclude that they do.

The first issue Cohen seeks to raise on appeal – that the district court erred in fixing the monetary loss for purposes of calculating his advisory guideline range – clearly falls within the scope of the appeal waiver. Cohen specifically agreed "to waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal whatever sentence is imposed, including any issues that relate to the establishment of the [applicable and advisory] Guideline range." J.A. 66. Indeed, Cohen agrees that, if this

[2] As noted above, the appeal waiver provision of the plea agreement explicitly allowed the government to retain its right to appeal. But even if we were to conclude that appeal waivers in plea agreements must always be reciprocal, regardless of the parties' desire to negotiate them otherwise, the remedy would not be to invalidate the defendant's waiver, but to deem the government as having waived its right to appeal as well. *Cf. United States v. Guevara,* 941 F.2d 1299, 1299-1300 (4th Cir. 1991). Accordingly, to the extent Cohen argues that the omission of a reciprocal waiver invalidates his waiver, the claim is without merit.

court concludes that his appeal waiver was knowing and intelligent, then his attack on the district court's loss calculation for purposes of determining his advisory sentencing guideline range would fall within the scope of his waiver. Accordingly, Cohen has waived his right to appeal this issue. *See Blick,* 408 F.3d at 170 ("[T]he fact that Blick claims in his net loss argument that the district court erred in its guideline calculation is of no moment here. . . . [A]n appeal waiver of the type involved in this case precludes a claim that the given sentence resulted from a misapplication of the Guidelines.") (internal quotation marks omitted).

With regard to the **restitution** order imposed during his sentencing, Cohen argues that his challenge falls outside the scope of his appeal waiver because "**restitution**" is not part of his "sentence." We disagree.

Although **restitution** enables victims to recover losses that might be available in civil litigation, **restitution** is nonetheless part of the criminal defendant's sentence. *See United States v. Bruchey,* 810 F.2d 456, 461 (4th Cir. 1987) ("Criminal **restitution** . . . is part of the sentencing process [and] . . . is fundamentally 'penal' in nature."); *United States v. Adams,* 363 F.3d 363, 365 (5th Cir. 2004) ("**Restitution** under the MVRA is a criminal penalty and a component of the defendant's sentence.") (internal quotation marks omitted); *United States v. Acosta,* 303 F.3d 78, 87 (1st Cir. 2002) ("It is undisputed that **restitution** is part of a sentence."); *United States v. Vandeberg,* 201 F.3d 805, 814 (6th Cir. 2000) ("**Restitution** is a part of one's sentence under the statutory scheme, and cannot be imposed without giving the defendant an opportunity to be heard."); *United States v. Ramilo,* 986 F.2d 333, 336 (9th Cir. 1993) ("Under the

[Victim and Witness Protection Act or VWPA], **restitution** is part of the criminal sentence."); *United States v. Satterfield,* 743 F.2d 827, 837 (11th Cir. 1984) ("The history [of the VWPA] is replete with references to **restitution** as part of the criminal sentence. . . . There can be little doubt that Congress intended the **restitution** penalties of the VWPA to be incorporated into the traditional sentencing structure.").[3]

The language of the statutory **restitution** provisions also supports the view that **restitution** should be considered part of the sentence. Under § 3553(a) of Title 18, the district court is required to consider "the need to provide **restitution** to any victims of the offense," when "determining the particular sentence to be imposed." 18 U.S.C.A. § 3553(a)(7) (West 2000). The MVRA requires a district court, "when *sentencing* a defendant convicted of an offense described in subsection (c)," to order, "in addition to . . . any other penalty authorized by law, that the defendant make ***restitution*** to the victim of the offense." 18 U.S.C.A. § 3663A(a)(1) (emphasis added). And, § 3664 of Title 18 provides that a "*sentence* that imposes an order of ***restitution*** is a final judgment notwithstanding the fact that . . . *such a sentence* can subsequently be . . . appealed and modified under section 3742 [of Title 18, United States Code]." 18 U.S.C.A. § 3664(*o*)(1)(B) (West Supp.

---

[3] The Mandatory Victims **Restitution** Act ("MVRA"), 18 U.S.C.A. § 3663A, was enacted in 1996 to amend the Victim and Witness Protection Act ("VWPA"), 18 U.S.C.A. § 3663, "by requiring district courts to impose 'full' **restitution** without considering the defendant's economic circumstances." *United States v. Karam,* 201 F.3d 320, 330 (4th Cir. 2000). These amendments, however, do not change the fundamental premise that **restitution** is part of a criminal defendant's sentence under either the VWPA or the MVRA.

2006) (emphasis added). This view is likewise consistent with our sentencing guidelines, which instruct courts to enter **restitution** for the full amount of an identifiable victim's loss if authorized under an appropriate statute. *See U.S. Sentencing Guidelines Manual* § 5E1.1(a) (2004).

In sum, we conclude that, as a general rule, a defendant who has agreed "[t]o waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal whatever sentence is imposed," J.A. 66, has waived his right to appeal a **restitution** order. *See United States v. Broughton-Jones,* 71 F.3d 1143, 1146-47 (4th Cir. 1995) (implicitly finding that a defendant who waives the "right to appeal her sentence on [the] grounds [listed in 18 U.S.C.A. § 3742(a)]" is deemed to have waived the right to appeal a lawfully imposed **restitution** order); *see also United States v. Sharp,* 442 F.3d 946, 948-52 (6th Cir. 2006) (dismissing appeal of **restitution** order where defendant waived the right "to appeal the conviction or sentence in this case, including the appeal right conferred by 18 U.S.C. § 3742, and to challenge the conviction or sentence collaterally," but reserved the right to appeal a punishment in excess of the statutory maximum and an upward departure from the most applicable sentencing guidelines range, because **restitution** fell under neither exception); *United States v. Behrman,* 235 F.3d 1049, 1052 (7th Cir. 2000) (concluding that "[a]n agreement waiving appeal from 'any sentence within the maximum provided by Title 18' or similar language would foreclose [an appeal from the **restitution** order]"); *but see United States v. Phillips,* 174 F.3d 1074, 1075-76 (9th Cir. 1999) (finding no waiver of right to appeal **restitution** where defendant "knowingly and voluntarily waive[d][his] right to appeal any sentence and **restitution** order imposed by the Court

and the manner in which the Court determine[d][his] sentence and **restitution** order, so long as the sentence is up to a net offense level of 12 following an adjustment for acceptance of responsibility," because the plea agreement contained no cap on **restitution** and the plea agreement was ambiguous as to the amount of damages the defendant might owe); *United States v. Cupit,* 169 F.3d 536, 539 (8th Cir. 1999) (per curiam) (considering challenge to **restitution** order despite defendant's agreement to "waive all rights to appeal whatever sentence is imposed," expressly declining to "resolve the waiver of **restitution** issue in this case"); *United States v. Ready,* 82 F.3d 551, 559-60 (2d Cir. 1996) (concluding that defendant did not waive his right to appeal a **restitution** order despite his "admittedly broad [] waiver of right to appeal 'whatever sentence is imposed'" because the terms of the plea agreement were ambiguous as to whether "sentence" included "**restitution**").

C.

Cohen's final claim is that the appeal waiver does not preclude his appeal from the **restitution** portion of his sentence because the *amount* of the **restitution** obligation exceeded the district court's authority under the MVRA.

Although we enforce appeal waivers that are knowing and voluntary, "even valid appeal waivers [do] not bar appellate review of every sentence." *Broughton-Jones,* 71 F.3d at 1146 (internal quotation marks omitted). A "defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court." *Id.* at 1147. Just as "a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty

provided by statute or based on a constitutionally impermissible factor such as race," a defendant could not be said to have waived his right to appellate review of a **restitution** order "imposed when it is not authorized by the [applicable **restitution** statute]." *Id.* This is because federal courts do not have the inherent authority to order **restitution**, but must rely on a statutory source. *See id.* at 1149. Because a **restitution** order that exceeds the authority of the statutory source "is no less 'illegal' than a sentence of imprisonment that exceeds the statutory maximum, appeals challenging the legality of **restitution** orders are similarly outside the scope of a defendant's otherwise valid appeal waiver." *Id.* at 1147.

In this case, the statutory source of the district court's authority to impose **restitution** is the MVRA, which required the district court to order **restitution** for (1) those who are "directly and proximately harmed as a result of the commission of an offense for which **restitution** may be ordered" and (2) "in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C.A. § 3663A(a)(2) (West 2000); *cf. United States v. Davenport*, 445 F.3d 366, 373 (4th Cir. 2006) (holding that court cannot order **restitution** under the MVRA to persons who are not victims of the offenses for which the defendant was convicted).

Cohen does not dispute that his offenses are ones for which **restitution** may be ordered. *See* 18 U.S.C.A. § 3663A(c)(1) (listing the offenses covered by the MVRA as including "an offense against property under this title, . . . including any offense committed by fraud or deceit").

Rather, he argues that the district court exceeded its authority under the MVRA by ordering him to pay **restitution** to all victims of the conduct falling within the scope of the conspiracy count *as it is defined in the Second Indictment.* According to Cohen, although he pled guilty to the conspiracy count in the Second Indictment, he effectively limited his role in the conspiracy (and, thereby, the amounts he owed in **restitution**) in the plea agreement.

We are unpersuaded. Under the express terms of the plea agreement, as confirmed by the colloquy at the plea hearing, Cohen unconditionally pled guilty "to . . . count one of the [Second] Indictment filed April 15, 2004," J.A. 65, which charged Cohen and others with a conspiracy to defraud health care providers during the time frame from June 1999 through April 2004. Cohen also agreed to "[t]o make **restitution** to any victim in whatever amount the Court may order, pursuant to 18 U.S.C. §§ 3663 and 3663A." J.A. 65. During the guilty plea hearing, Cohen confirmed to the district court that he was pleading guilty to the conspiracy count as defined in the Second Indictment:

> Q. How do you plead to Count One of the April 15, 2004 original indictment [the Second Indictment]?
>
> A. Guilty, Your Honor.
>
> Q. Did you as charged in Count One [of the Second Indictment] on or about October 22, 1998 involve yourself in a conspiracy; that is, an agreement with at least two people involved, to commit healthcare fraud and at some point during this conspiracy knowingly perform one of the overt acts charged in the indictment?

> A. Yes, Your Honor.
>
> THE COURT: Thank you. You may be seated. Madame United States Attorney, I'll hear your proffer of the facts you believe the United States could prove at trial so I might have an independent factual basis for accepting Dr. Cohen's plea.

S.J.A. 867. At that point, the court was provided with the requisite independent factual basis for accepting the plea on the conspiracy count – the same factual recitation that was set forth as the factual stipulation in the plea agreement. By way of summary, Cohen admitted having an interest in a number of separate clinics (most of which listed the same address), practicing within those clinics, and hiring various medical doctors to also evaluate patients who visited the clinics. In addition, Cohen admitted that "[b]etween 2000 and 2002," he and at least one of these physicians personally "caused materially false and fraudulent claims for reimbursement to be submitted . . . to the insurance companies for needle electromyographies supposedly administered to patients, knowing that those services had not been administered." J.A. 76.

Although there is no such expressed intent in the language of the agreement, Cohen now claims that the intent of the "factual stipulation" was to limit his "offense of conviction" under the Second Indictment for purposes of computing his **restitution** obligation to false claims for "needle electromyographies" submitted to insurance companies "[b]etween 2000 and 2002" that amounted to no more than $7,165.00. J.A. 76. In other words, Cohen argues that the offense of conviction for purposes of the MVRA was restricted to Cohen's specific "admissions of guilt as specifically defined by the factual basis of his plea" contained in the plea agreement. As a result, Cohen

argues, the district court was authorized to impose a **restitution** obligation of no more than $7,331.50 ($7,165.00 for the conspiracy count in the Second Indictment, plus $166.50 for the face amount of the claims involved in the two counts of mail fraud in the First Indictment).

We are unpersuaded by Cohen's attempt to use the factual stipulation, without more, to limit his role in the conspiracy to which he pled guilty. Cohen pled guilty to Count One of the Second Indictment, which charged an overarching conspiracy encompassing a wide array of fraudulent conduct that was not limited to false claims to insurance companies for needle electromyographies between 2000 and 2002. One of the overt acts charged in the conspiracy count of the Second Indictment was that, "[o]n multiple occasions between January 2000 and February 2002, [Cohen] and a co-conspirator caused materially false claims to be filed with [the] insurance companies falsely claiming that medical doctors had administered electromyography procedures to patients" at two of Cohen's clinics. J.A. 36. But, there is no indication that, when Cohen admitted in his plea agreement that he submitted false claims to insurance companies for "needle electromyographies" during the time frame "[b]etween 2000 and 2002," J.A. 76, the intent of the parties was to effectively rewrite Count One of the Second Indictment and have Cohen plead guilty only to a conspiracy so limited in time and scope. Rather, we think the clear import of the language was to establish Cohen's admission that he "knowingly perform[ed] one of the overt acts charged in the [Second Indictment]," S.J.A. 867, for purposes of providing the requisite factual basis for acceptance of his plea to Count One of the Second Indictment as written. This is all

that is needed to hold him responsible for the full extent of the conspiracy. *See United States v. Burgos,* 94 F.3d 849, 858 (4th Cir. 1996) (en banc) (explaining that the Government does not need to prove that the defendant had "full knowledge of all of [the conspiracy's] details," and that a defendant can be convicted of conspiracy "if he joins the conspiracy with an understanding of the unlawful nature thereof and willfully joins in the plan on one occasion, . . . even though he had not participated before and even though he played only a minor part") (internal quotation marks omitted).

In sum, we are satisfied that the district court complied with its mandatory statutory obligation to order **restitution** to all "victims" of the conspiracy to which Cohen pled, even if Cohen did not expressly admit to each and every overt act alleged to support it, and that the district court did not exceed its authority in doing so. *See* 18 U.S.C.A. § 3663A(a); *United States v. Newsome,* 322 F.3d 328, 341 (4th Cir. 2003) (rejecting defendant's claim that **restitution** should be limited to the harm caused by the substantive offense of which he was convicted, despite his conviction of a broader conspiracy; "under the MVRA, each member of a conspiracy that in turn causes property loss to a victim is responsible for the loss caused *by the offense*") (emphasis in original). The plea agreement contains no provision purporting to limit Cohen's **restitution** obligation and, on the contrary, the agreement clearly documents the parties' understanding that **restitution** would be a component of Cohen's sentence and that Cohen was agreeing "[t]o make **restitution** to any victim in whatever amount the Court may order, pursuant to 18 U.S.C.A. §§ 3663 and 3663A." J.A. 65.

Because the district court's **restitution** award was within the scope of its authority under the MVRA, Cohen's challenge to the amount of **restitution** ordered falls within the scope of the appeal waiver contained in the plea agreement.

III.

For the foregoing reasons, we grant the government's motion to dismiss Cohen's appeal in its entirety.

DISMISSED.

United States District Court
Eastern District of North Carolina –
Eastern Division

UNITED STATES OF AMERICA

v.

STEVEN IRA COHEN

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: **4:03CR00077-001 & 4:04-CR-28-1H**

LARRY C. ECONOMOS
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) Second Super. Indict. 4:03-CR-77-1H Cts 16 & 17; Indict. 4:04-CR-28-1H Ct. 1

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1341	Mail Fraud	10/28/1998	16 & 17 of 4:03-CR-77-1H
18 U.S.C. § 1347 and 371	Conspiracy to Commit Health Care Fraud	10/28/1998	1 of 4:04-CR-28-1H

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 1-15,18-37 of 4:03-CR-77-1H/Cts. 2-515 of 4:04-CR-28-1H are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: _____

Defendant's Date of Birth: _____

Defendant's USM No.: 23980-056

Defendant's Resident Address:

_____

_____

_____

Defendant's Mailing Address:

_____

_____

Greenville NC

04-21-2005
Date of imposition of Judgment

/s/ [Illegible]
Signature of Judicial Officer

MALCOLM J. HOWARD
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

4-21-05
Date

I certify the foregoing to be a true and [illegible] copy of the original [illegible]
Fred [Illegible]
United States District Court
Eastern District of [Illegible]
/s/ Jack [Illegible]
Deputy Clerk

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 28 month(s).

This term consists of 28 months on Counts 16 & 17 of 4:03-CR-77-1H, and 28 months in Count 1 of 4:04-CR-28-1H, all such counts to be served concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ a.m./p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).

This term consists of 3 years on counts 16 and 17 of 4:03-CR-77-1H and a term of 3 years on Count 1 of 4:04-CR-28-1H, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☒ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision – Page

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal

history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall consent to a warrantless search by a United States probation officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall participate in a program of mental health treatment, as directed by the probation office.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 300.00	$	$ 371,901.00

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . .$ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☒ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in a priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Blue Cross Blue Shield	$290,370.00	$290,370.00	
State Farm Insurance	$49,440.00	$49,440.00	
Nationwide Insurance	$20,135.00	$20,135.00	
Allstate Insurance	$11,956.00	$11,956.00	
Totals:	$371,901.00	$371,901.00	

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ See special instructions below

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed

is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ *(e.g. equal, weekly, monthly, quarterly)* installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Payment of the total special assessment shall be due in full immediately. No fine is imposed in this case. Payment of restitution shall be due and payable in full immediately. However, if the defendant is unable to pay in full immediately, the special assessment and restitution may be paid through the Inmate Financial Responsibility Program. The court, having considered the defendant's financial resources and ability to pay, orders that any balance still owed at the time of release shall be paid in installments of $500.00 per month to begin 60 days after the defendant's release from prison. At the time of the defendant's release, the probation officer shall take into consideration the defendant's ability to pay the restitution ordered and shall notify the court of any needed modification of the payment schedule. No interest imposed on the restitution.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk, U.S. District Court, Attn: Financial Unit, Post Office Box 25670, Raleigh, NC 27611, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

STATEMENT OF REASONS
(Not for Public Disclosure)

THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS WITHOUT CHANGE.

OR

X **THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS BUT WITH THESE CHANGES:** (Use Page 3, if necessary.)

X **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level or specific offense characteristics):

☐ **Chapter Three of the U.S.S.G. Manual** adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

☐ **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

☐ **THE COURT ADOPTS THE PRESENTENCE REPORT WITH THESE COMMENTS OR FINDINGS** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions. Specify court comments or findings, including paragraphs in the presentence report.) (Use Page 3, if necessary.)

GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):

Total Offense Level: 18

Criminal History Category: I

Imprisonment Range: 27 to 33 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 6,000 to $ 60,000

X Fine waived or below the guideline range because of inability to pay.

THE SENTENCE IS WITHIN THE GUIDELINE RANGE, THAT RANGE DOES NOT EXCEED 24 MONTHS, AND THE COURT FINDS NO REASON TO DEPART.

OR

THE SENTENCE IS WITHIN A GUIDELINE RANGE, THAT RANGE EXCEEDS 24 MONTHS, AND THE SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS: (Use Page 3, if necessary.)

STATEMENT OF REASONS
(Not for Public Disclosure)

RESTITUTION DETERMINATIONS

Total Amount of Restitution: $ 371,901.00.

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complications and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

☐ Restitution is not ordered for other reasons:

☐ Partial restitution is ordered under 18 U.S.C. § 3663(c) for these reasons:

DEPARTURE (Check all that apply)

The sentence departs below the guideline range for the following reasons; or

☐ The sentence departs above the guideline range for the following reasons:

Pursuant to a Plea Agreement

based on 5K1.1 motion of the government based on the defendant's substantial assistance;

☐ based on a government motion pursuant to an early disposition program;

☐ based on a binding plea agreement for departure which the court has accepted (cite below reason, if applicable);

☐ based on a plea agreement which cites the below reason for departure, which the court finds to be justified; or

☐ based on a plea agreement which states that the government will not oppose a defense departure motion and cites the below reason.

Pursuant to a Motion Not Addressed in a Plea Agreement

☐ pursuant to a 5K1.1 motion of the government based on the defendant's substantial assistance;

☐ pursuant to a government motion based on the below reason for departure; or

☐ pursuant to a defense motion based on the below reason for departure to which the government has not objected; or

☐ pursuant to a defense motion based on the below reason for departure to which the government has objected.

☐ Other than plea agreement or motion by the parties based on the below reason for departure.

Reason(s) for Departure

- ☐ 4A1.3 Criminal History Adequacy (explain)
- ☐ 5K2.0 Aggravating or Mitigating Circumstances (explain):
- ☐ 5K2.1 Death
- ☐ 5K2.2 Physical Injury
- ☐ 5K2.3 Extreme Psychological Injury
- ☐ 5K2.4 Abduction or Unlawful Restraint
- ☐ 5K2.5 Property Damage or Loss
- ☐ 5K2.6 Weapons and Dangerous Instruments
- ☐ 5K2.7 Disruption of Government Function
- ☐ 5K2.8 Extreme Conduct
- ☐ 5K2.9 Criminal Purpose
- ☐ 5K2.10 Victim's Conduct
- ☐ 5K2.11 Lesser Harm
- ☐ 5K2.12 Coercion and Duress
- ☐ 5K2.13 Diminished Capacity
- ☐ 5K2.14 Public Welfare
- ☐ 5K2.16 Voluntary Disclosure of Offense
- ☐ 5K2.17 High-Capacity Semiautomatic Firearm
- ☐ 5K2.18 Violent Street Gang
- ☐ 5K2.20 Aberrant Behavior
- ☐ 5K2.21 Dismissed and Uncharged Conduct
- ☐ 5K2.22 Age or Health of Sex Offenders

☐ 5K2.23 Discharged Terms of Imprisonment

☐ 5K3.1 Early Disposition, "fast-track" Program

Other (e.g., 2B1.1 commentary, 5H1.1-5H1.6 or 5H1.11) (explain and state guideline and/or statutory basis). (Use Page 3, if necessary.)

STATEMENT OF REASONS
(Not for Public Disclosure)

ADDITIONAL PRESENTENCE REPORT AND GUIDELINE APPLICATION CHANGES
(If Necessary.)

The court ruled that the loss, based on a preponderance of the evidence was $17,150 for Allstate, $20,135 for Nationwide, $49,440 for State Farm, and $290,370 for BCBS. This results in a total loss of $371,901. The court also ruled that the enhancement for obstruction was warranted and that a 2-level reduction for acceptance. This results in a total offense level of 18, a guideline range of 27-33 months, and a fine range of $6,000-$60,000.

SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS
(If necessary.)

ADDITIONAL COMMENTS OR FINDINGS CONCERNING INFORMATION IN PRESENTENCE REPORT
(If necessary.)

ADDITIONAL REASONS FOR DEPARTING FROM THE GUIDELINE RANGE
(If necessary.)

Defendant's Soc. Sec. No.:	071-42-3317	4/21/05
Defendant's Date of Birth:	12/27/1951	Date of Imposition of Judgment
Defendant's Residence Address:	3100 Memorial Drive Greenville, NC 27834	/s/ [Illegible] Signature of Judge
		MALCOLM J. HOWARD, US DISTRICT JUDGE Name and Title of Judge
Defendant's Mailing Address:	3100 Memorial Drive Greenville, NC 27834	421/05 Date Signed

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 18, 2006

No. 05-4565
CR-03-77-H
CR-04-28-H

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

STEVEN IRA COHEN

Defendant-Appellant

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered for a panel composed of Judge Niemeyer, Judge Traxler, and Judge Goodwin, United States District Judge, sitting by designation.

For the Court,

/s/ Patricia S. Connor
CLERK